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Shirley Koh Gek Ngo & Anor v Tanah Emas Bio-Tech (M) Sdn Bhd (formerly known as Gagnar Bio-Tech (M) Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1078–05 OF 2012
ABDUL MALIK ISHAK, ABDUL WAHAB PATAIL AND AZIAH ALI JJCA
13 JUNE 2014

Contract — Agreement — Breach — Sale of shares agreement — Respondent purchased 3,000,000 ordinary shares — Main basis for transaction was that first appellant must remain in employment for at least five years — Whether first appellant's action in ceasing employment with company breach of principal agreement — Claim for specific performance compelling appellants to purchase from 6,000,000 ordinary shares — Appeal against decision of High Court

The first and second appellants were a Malaysian and a Singaporean respectively while the respondent was a company incorporated in Malaysia. Through a sale of shares agreement and a supplemental agreement, the respondent purchased 3,000,000 ordinary shares ('the sale shares') equivalent to 60% of the paid-up capital of Hoest (SEA) Sdn Bhd ('the company') from the appellants at the consideration price of RM3,440,000. The respondent alleged that one of the main basis for the transaction was that the first appellant, who was the executive director of the company must remain in employment for at least five years from the date of the principal agreement. Due to allegation of beach, the appellant issued a letter of demand cum termination but the respondent denied the allegations and counter demanded that the appellants remedy their breaches of the agreements. The appellants contended that the first appellant was compelled to resign from the company due to the respondent's own unfair, improper and unreasonable actions and lack of financial support which interfered with the first appellant's discharge of her duties as executive director and did not allow her to continue functioning. The respondent claimed that the first appellant's action in ceasing employment with the company was a breach the principal agreement. The respondent demanded that the appellants repurchase the shares. The appellants failed to comply with the plaintiff's demands. A week later, the company was placed in receivership and the receiver and manager was appointed by Public Bank Bhd. The respondent contended that the appointment of the receiver and manager was due to the actions of the first appellant.

The appellants however contended that it was the respondent's breach of its obligations under the agreements that resulted in the company becoming unoperational and a receiver and manager was appointed by the bank. The respondent filed the present suit and claimed for specific performance

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compelling the appellants to purchase from the respondent 6,000,000 ordinary shares in the company for a total purchase consideration of RM6,440,000; damages in addition to or in lieu of specific performance; interest, and costs. The appellants counterclaimed for damages for alleged loss of profits and financial losses arising from the failure to procure an alleged joint venture; the failure to replace the securities in the form of personal guarantees executed by the appellants in favour of the banks; losses from directors' loan and shareholders' advances in the sum of RM1,300,000 plus RM346,139.15; and losses arising from the sale of the appellants' shares in the company at an undervalue. At the High Court, the issues raised were whether there was a valid and enforceable contract between the parties for the purchase of the company's shares; whether the appellants had failed, refused and/or neglected to comply with the terms of the agreements; and whether there was demand from the respondent for the appellants to repurchase the shares. The High Court held there was a valid and enforceable contract between the parties. In the present appeal, the appellants raised the issues of whether the order for specific performance is unsustainable in law; the learned judge had misconstrued the 'buy back clause'; the first appellant's resignation vis-a-vis the issue of liability; and the order for specific performance and the hardship caused to the appellants.

Held:

(1) The learned judge had failed to consider whether the appellant's resignation was justified in view of the respondent's own breach of its obligation under cl 12.4 to manage the finances of the company which ultimately led to the company being wound up (see para 46).

(2) There was ample evidence to show that the company was in financial distress and this had been communicated to the respondent. The first appellant had not been paid her remuneration. In fact, in 2011, the appellants, as guarantors, had to pay off the company's bank loans due to the respondent's default of its obligations as shown in the letter from Maybank and the first appellant's letter to the respondent's solicitors (see para 47).

(3) Clause 12.4 merely imposed on the appellants the obligation to operate the company. The obligation to provide financial support to the company was on the respondent. Contrary to the submissions by the respondent that the respondent was only contractually obliged to provide financial management to the company, there was evidence to show that the respondent was aware of its obligation to provide financial support to the company in the form of a letter of support issued by the respondent. Despite that, the respondent made clear its intention not to provide any financial support to the company. On the evidence, the respondent was in breach of cl 12.4 (see para 48).

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[Bahasa Malaysia summary

Perayu pertama dan kedua masing-masing adalah rakyat Malaysia dan Singapura manakala responden adalah syarikat diperbadankan di Malaysia. Melalui perjanjian jual beli saham dan perjanjian tambahan, responden membeli 3,000,000 saham biasa ('jualan saham') bersamaan 60% modal berbayar Hoest (SEA) Sdn Bhd ('syarikat') daripada perayu-perayu pada balasan harga sebanyak RM3,440,000. Responden mendakwa bahawa satu daripada asas utama untuk transaksi adalah bahawa perayu pertama, yang merupakan pengarah eksekutif syarikat mesti dikekalkan dalam pekerjaan untuk sekurang-kurangnya lima tahun daripada tarikh perjanjian utama. Disebabkan oleh dakwaan kemungkiran, perayu mengeluarkan surat tuntutan merangkap penamatan tetapi responden menafikan dakwaan-dakwaan dan menuntut balas bahawa perayu meremedikan kemungkiran-kemungkiran mereka terhadap perjanjian-perjanjian. Perayu-perayu menghujahkan bahawa perayu pertama adalah dipaksa untuk meletakkan jawatan daripada syarikat kerana tindakan responden sendiri tidak adil, tidak wajar dan tidak munasabah dan kekurangan sokongan kewangan yang mengganggu pelaksanaan tugas perayu pertama sebagai pengarah eksekutif dan tidak membenarkan dia untuk terus berfungsi. Responden mendakwa bahawa perayu pertama dalam menamatkan pekerjaan dengan syarikat merupakan kemungkiran perjanjian utama. Responden menuntut bahawa perayu-perayu membeli semula saham-saham. Perayu-perayu gagal untuk mematuhi tuntutan-tuntutan responden. Seminggu kemudian, syarikat telah diletakkan dalam penerimaan dan penerima dan pengurus telah dilantik oleh Public Bank Bhd. Responden berhujah bahawa pelantikan penerima dan pengurus adalah disebabkan oleh tindakan-tindakan perayu pertama. Manakala perayu berhujah bahawa ia adalah kemungkiran responden di bawah perjanjian yang menyebabkan syarikat menjadi tidak beroperasi dan penerima dan pengurus telah dilantik oleh bank. responden memfailkan guaman ini dan menuntut pelaksanaan spesifik memaksa perayu-perayu membeli daripada responden 6,000,000 saham biasa dalam syarikat dengan jumlah balasan belian sebanyak RM6,400,000; ganti rugi sebagai tambahan kepada atau sebagai ganti pelaksanaan spesifik; faedah, dan kos.

Perayu-perayu menuntut balas untuk ganti rugi untuk kehilangan keuntungan yang dikatakan dan kerugian kewangan yang dikatakan berbangkit daripada kegagalan untuk mendapatkan usaha sama yang dikatakan; kegagalan untuk menggantikan sekuriti dalam bentuk jaminan peribadi disempurnakan oleh perayu-perayu yang memihak kepada bank; kerugian daripada pengarah dan pemegang saham pinjaman 'kemajuan dalam jumlah wang sebanyak RM1,300,000 campur RM346,139.15; dan kerugian yang timbul daripada penjualan saham perayu-perayu dalam syarikat pada satu nilai kurang. Di Mahkamah Tinggi, isu yang timbul adalah sama ada terdapat kontrak yang sah dan boleh dilaksanakan antara pihak-pihak untuk pembelian saham syarikat; sama ada perayu-perayu telah gagal, menolak dan/atau mengabaikan untuk

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mematuhi dengan terma-terma perjanjian; sama ada terdapat tuntutan daripada responden terhadap perayu-perayu untuk membeli semula saham-saham. Mahkamah Tinggi memutuskan terdapat kontrak yang sah dan boleh dilaksanakan antara pihak-pihak. Dalam rayuan ini, perayu-perayu membangkitkan isu-isu sama ada perintah untuk pelaksanaan spesifik adalah tidak mapan di dalam undang-undang; hakim perbicaraan telah salah tafsir 'buy back clause'; perletakkan jawatan perayu pertama vis-a-vis isu tanggungan; dan perintah untuk pelaksanaan spesifik dan kesusahan yang disebabkan kepada perayu-perayu.

Diputuskan:

(1) Hakim perbicaraan telah gagal untuk mempertimbangkan sama ada peletakkan jawatan perayu adalah wajar memandangkan kemungkiran responden sendiri terhadap tanggungjawabnya di bawah klausa 12.4 untuk menguruskan kewangan syarikat yang mana akhirnya membawa kepada syarikat itu digulungkan (lihat perenggan 46).

(2) Terdapat keterangan yang mencukupi untuk menunjukkan bahawa syarikat itu berada dalam kesulitan kewangan dan itu telah disampaikan kepada responden. Perayu pertama tidak dibayar gaji. Malahan, pada tahun 2011, perayu-perayu, sebagai penjamin, terpaksa membayar pinjaman syarikat kerana kegagalan responden terhadap tanggungjawabnya seperti yang ditunjukkan di dalam surat daripada Maybank dan surat perayu pertama kepada peguamcara reponden (lihat perenggan 47).

(3) Klausa 12.4 hanya mengenakan atas perayu-perayu tanggungjawab untuk mengendalikan syarikat. Tanggungjawab untuk memberikan sokongan kewangan kepada syarikat adalah atas responden. Bertentangan dengan hujahan-hujahan oleh responden bahawa responden hanya bertanggungan secara kontrak untuk menyediakan pengurusan kewangan kepada syarikat, terdapat keterangan untuk menunjukkan bahawa responden sedar akan tanggungjwabnya untuk memberikan sokongan kewangan kepada syarikat dalam bentuk surat dikeluarkan oleh responden. Meskipun begitu, responden dengan jelas tidak berniat untuk memberikan apa-apa sokongan kewangan kepada syarikat itu. Atas keterangan, responden telah memungkiri klausa 12.4 (lihat perenggan 48).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

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Cases referred to

Alghussein Establishment v Eton College [1988] 1 WLR 587, HL (refd)
Code Focus Sdn Bhd v Tan Chee Hoe & Sons Sdn Bhd [2013] 4 MLJ 59; [2013] 4 CLJ 1053, CA (refd)
Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64; [2013] 5 CLJ 949, FC (refd)
Hendrick International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & Ors [2003] 3 MLJ 742, CA (refd)
K Narendra v Riviera Apartments (P) Ltd AIR 1999 SC 2309, SC (refd)
M Ratnavale v S Lourdenadin M Mahadevan v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd [2004] 4 CLJ 18, CA (refd)
Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)
Subramaniam a/l AV Sankar & Ors v Peter Tang Swee Guan [2010] 4 MLJ 626, CA (refd)
Sullivan v Henderson [1973] 1 All ER 48, Ch D (refd)
Teo Sing Teck v Yii Chee Ming and Others [2008] MLJU 930; [2008] 1 LNS 831, CA (refd)

Legislation referred to

Companies Act 1948 [UK] s 227
Companies Act 1965 ss 181, 223
Contracts Act 1950 ss 52, 53
Rules of the Court of Appeal 1994 r 18(2)
Specific Relief Act 1950 s 21(2)(b)

Appeal from: Civil Suit No MT3–22–1301 of 2006 (High Court, Shah Alam)

Cyrus Das (Lam Ko Luen with him) (Shook Lin & Bok) for the appellant.
Wong Rhen Yen (Mohd Syazmin bin Mohd Soffian with him) (Dennis Nik & Wong) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The first appellant, Shirley Koh Gek Ngo ('the first defendant in the court below') is a Malaysian and the second appellant, Koh Hang Yong ('the second defendant in the court below') is a Singaporean.

[2] The respondent, Tanah Emas Bio-Tech (M) Sdn Bhd ('the plaintiff in the court below') is a private limited company incorporated in Malaysia.

[3] The appellants and the respondent had entered into two agreements for the sale of shares by the appellants to the respondent. The respondent claimed

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that the first appellant had committed a breach of the agreements and filed a suit for, inter alia, specific performance. The High Court at Shah Alam decided in favour of the respondent, hence this appeal.

[4] We have considered the appeal records and the submissions of both parties. We allowed the appeal and set aside the order of the High Court. We awarded costs of RM30,000 here and below. The deposit was refunded. We now give our reasons below.

SALIENT FACTS

[5] The appellants and the respondent had entered into two agreements ie a sale of shares agreement dated 28 July2003, ('the principal agreement') and a supplemental agreement dated 27 November 2003 ('the supplemental agreement') wherein the respondent had purchased 3,000,000 ordinary shares ('the sale shares') equivalent to 60% of the paid-up capital of a company known as Hoest (SEA) Sdn Bhd ('the company') from the appellants. The respondent purchased 1,800,000 shares from the first appellant and 1,200,000 from the second appellant. The purchase consideration paid by the respondent was RM3,440,000. The first appellant was the executive director of the company.

[6] According to the respondent, one of the main basis for the transaction as reflected in cl 2.3.6 of the was that the first appellant must remain in the employment of the company for at least five years from the date of the principal agreement. Clause 12.3 of the principal agreement provides that in the event of a breach of cl 2.3.6, the respondent shall have a right to require the appellants to repurchase the sale shares from the respondent at the market value including the respondent's full acquisition costs, being not less than the acquisition costs stated in the principal agreement.

[7] The other salient terms of the principal agreement were as follows:

(a) cl 2.5 provides that the appellants undertook to secure four mills licensing fees contract for the company upon which the respondent would remunerate the appellants;

(b) cl 12.4 provides that the appellants shall continue to be in charge of the operational management of the company and the finance management shall be managed by the respondent's nominee;

(c) cl 12.5 provides that the parties shall ensure that the company's shareholding or any subsidiary to be opened in China through Hoest Bio-Tech (Liang Yin Gan) Pte Ltd, Jiangsu Province, China for the business shall not be less than 60% of the total paid-up capital of the subsidiary company and the company's involvement must not be prejudiced.

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[8] Clause 3.1 of the principal agreement provides that within 60 days from the completion date of the agreement, the respondent shall agree to increase the paid-up capital of the company to RM10,000,000. The respondent was to subscribe to a further 3,000,000 shares of the company at par value of RM1 per share of the increased 5,000,000 shares. The appellants were to subscribe for the remaining 2,000,000 shares at par value of RM1 per share which shall be funded by the respondent. Upon the increase in the paid-up capital of the company, the respondent held 6,000,000 ordinary shares of RM1 each in the company for which the respondent had paid RM6,440,000.

[9] The respondent alleged that the appellants had breached their obligations under the agreements. According to the respondent, the appellants had failed to secure the four mills licensing contracts despite repeated demands and, despite the breaches, had made unfounded allegations against the respondent. The appellants then issued through their solicitors a letter of demand cum termination dated 19 December 2005. The respondent through its solicitors denied the allegations and counter demanded that the appellants remedy their breaches of the agreements.

[10] On 17 June 2006 the first appellant resigned as executive director of the company. The appellants contended that the first appellant was compelled to resign from the company due to the respondent's own unfair, improper and unreasonable actions and lack of financial support which interfered with the first appellant's discharge of her duties as executive director and did not allow her to continue functioning.

[11] The respondent claimed that the first appellant's action in ceasing employment with the company was a breach of cl 2.3.6 of the principal agreement. On 10 August 2006 the respondent exercised its right under cl 12.3 of the principal agreement and demanded that the appellants repurchase the shares. The appellants failed to comply with the plaintiff's demands.

[12] Approximately one week later ie on 17 August 2006 the company was placed in receivership and the receiver and manager was appointed by Public Bank Bhd (p 356 appeal record). The respondent contended that the appointment of the receiver and manager was due to the actions of the first appellant. The appellants however contended that it was the respondent's breach of its obligations under the agreements that resulted in the company becoming unoperational and a receiver and manager was appointed by the bank.

[13] On 5 October 2006 the respondent filed the present suit and claimed the following reliefs:

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(a) specific performance compelling the appellants to purchase from the respondent 6,000,000 ordinary shares in the company for a total purchase consideration of RM6,440,000;

(b) damages in addition to or in lieu of specific performance;

(c) interest, and

(d) costs.

[14] The appellants counterclaimed for damages for alleged loss of profits and financial losses arising from:

(a) the failure to procure an alleged joint venture with Felcra Bhd;

(b) the failure to replace the securities in the form of personal guarantees executed by the appellants in favour of the banks;

(c) losses from directors' loan and shareholders' advances in the sum of RM1,300,000 plus RM346,139.15; and

(d) losses arising from the sale of the appellants' shares in the company at an undervalue.

[15] At the High Court the following issues were raised by the respondent:

(a) whether there was a valid and enforceable contract between the parties for the purchase of the company's shares;

(b) whether the appellants had failed, refused and/or neglected to comply with the terms of the agreements; and

(c) whether there was demand from the respondent for the appellants to repurchase the shares.

[16] In brief, the learned judge of the High Court found as follows:

(a) there was a valid and enforceable contract between the parties;

(b) that the first appellant had breached cl 2.3.6 of the principal agreement thus triggering the buy-back cl 12.3 and the appellants had failed to prove that they had complied with their obligation under the agreements to secure licensing fees contract with Felcra and PT Greenlife; and

(c) the respondent had, through his solicitors Messrs Cheang & Ariff, issued a notice on 10 August 2006 demanding the appellants to repurchase the shares (exh P12).

[17] In respect of the appellants' counterclaim, Her Ladyship found as follows:

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(a) the appellants had failed to prove that they had successfully secured the licensing fees contract with Felda and PT Greenlife;

(b) the appellants had failed to plead their losses incurred arising from the sale of their shares at an undervalue and further no evidence was shown that the appellants had sold their shares at a discount; and

(c) notwithstanding that the company was at the material time in receivership, in the event cl 2.3.6 is breached, the respondent was entitled under cl 12.3 to apply for a decree of specific performance.

[18] Accordingly the learned judge allowed prayers 1 and 3 of the statement of claim with costs. Notwithstanding that the company had been wound up even before the suit was filed, Her Ladyship ordered the appellants to repurchase from the respondent the 6,000,000 ordinary shares of the company for a total of RM6.44m. In respect of the appellants' counterclaim, Her Ladyship held that the appellants had failed to prove their counterclaim and therefore the counterclaim was dismissed with costs.

THE APPEAL

Submissions for the appellants

[19] Before us learned counsel for the appellants, Dato' Cyrus Das canvassed the following issues:

(a) the order for specific performance is unsustainable in law;

(b) the learned judge had misconstrued the 'buy back clause';

(c) the first appellant's resignation vis-a-vis the issue of liability; and

(d) the order for specific performance and the hardship caused to the appellants.

(a) The order of specific performance is unsustainable in law

[20] Learned counsel for the appellants submitted that by virtue of s 223 of the Companies Act 1965, the order of specific performance is unsustainable in law and the learned trial judge had erred in giving the said order.

[21] Section 223 of the Companies Act 1965 states as follows:

> Avoidance of disposition of property, etc
>
> 223 Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

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[22] In support learned counsel cited the case of *Sullivan v Henderson* [1973] 1 All ER 48, wherein the court dealt with s 227 of the UK Companies Act 1948 , which is in pari materia with s 223 of our Companies Act 1965. In that case one question that arose was whether there was a case for specific performance of a contract for the sale of shares in a company that was made before the commencement of the compulsory winding up of the company, but was being enforced after the winding-up has commenced. Megarry J held that the claim for specific performance must fail for the reason that a court would be reluctant to force specific performance upon the purchaser who had agreed to take a fully effective transfer of the shares, when the transfer, although valid as between the purchaser and the vendor, would be void against the company. Accordingly judgment was given for the plaintiff for damages to be assessed.

[23] Learned counsel further cited the decision of this court in the case of *Teo Sing Teck v Yii Chee Ming and Others* [2008] MLJU 930; [2008] 1 LNS 831, a case regarding a petition under s 181 of the Companies Act 1965 . In that case Abdul Aziz bin Abdul Rahim J (as he then was) in delivering the judgment of the court followed the principle decided in the case of *Hendrick International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & Ors* [2003] 3 MLJ 742, and held that since the company had been wound up, the s 181 petition was no longer sustainable. In the judgment, the court had also considered s 223 of the Companies Act 1965 and this was what the court said:

> Another compelling reason why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator was the provision of s 223 of the Act, which provided that 'any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void'. Thus, in view of this prohibition, the prayers in the said petition requiring the first respondent to purchase the appellant's shares in the said company at a price of RM7,998,000 or at a fair value to be assessed by a firm of independent auditors cannot be entertained unless sanctioned by the court.

[24] Based on the aforementioned authorities, learned counsel submitted that it is legally impossible to comply with the order for specific performance.

(b) The 'buy back clause'

[25] Clause 12.3 of the principal agreement (p 194 of the appeal record) states as follows:

> 12.3 Buy Back
>
> In the event the Clause 2.3.6 of this Agreement is not performed, the Purchaser shall have the right to require the Vendors to repurchase the Sale Shares at the market value which shall take into consideration of all acquisition costs made by the

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Purchaser including the incentive payments in this Agreement (which shall not be less than the acquisition costs stated in this Agreement).

[26] It was submitted that the learned judge had erred when Her Ladyship ordered specific performance of all the 6,000,000 shares when cl 12.3 was confined to the 'sale shares' only. Learned counsel referred to cl 1 of the principal agreement which defined 'sale shares' to mean the 3,000,000 ordinary shares equivalent to 60% of the issued and paid-up capital of the company (p 181 of the appeal record). Therefore cl 12.3 did not include the additional 3,000,000 shares which the respondent had purchased subsequently under cl 3.1.

(c) the first appellant's resignation vis a vis the issue of liability

[27] Learned counsel submitted that there were mutual promises between the parties which were fundamental to the agreements and referred to cl 12.4 of the principal agreement which provides that the operational management of the company was the obligation of the appellants whilst the finance management of the company was an obligation assumed by the respondent. Clause 12.4 states as follows:

12.4 Management

The parties hereby agree the Vendors shall continue to be in charge of the operational management of the company and the finance management shall be managed by the Purchaser's nominee.

[28] Learned counsel submitted that where there were mutual reciprocal promises, one party could not be required to perform unless the other party has performed its part of the bargain. In support learned counsel referred to ss 52 and 53 of the Contracts Act 1950 and the judgment of this court in the case of *Code Focus Sdn Bhd v Tan Chee Hoe & Sons Sdn Bhd* [2013] 4 MLJ 59; [2013] 4 CLJ 1053; [2012] 1 LNS 828.

[29] Section 52 of the Contracts Act 1950 provides as follows:

Promisor not bound to perform unless reciprocal promise ready and willing to perform

52 When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

And s 53 provides as follows:

Order of performance of reciprocal promises

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> 53 Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

[30] In *Code Focus Sdn Bhd*, Abdul Malik Ishak JCA had stated, inter alia, as follows:

> In our judgment, the reciprocal nature of the parties contractual obligations attract the provisions of ss 52, 53 and 55 of the Contracts Act 1950. Section 52 of the Contracts Act 1950 stipulates that when a contract consists of reciprocal promises which are to be simultaneously performed, the promisor need not perform his promise unless the promisee is ready and willing to perform his promise. For s 52 of the Contracts Act 1950 to apply, the parties must have made promises that are to be performed simultaneously ...

[31] Learned counsel referred to various letters to the respondent where the respondent had been notified that, as a result of lack of funds, the company was in financial distress. In the first appellant's letter dated 6 April 2006 (p 499 of the appeal record), both the company and the respondent were informed that the company had become inoperable due to the absence of financial support and all the staff had to be retrenched since there was no funds to pay their March 2006 salaries. Sundry debtors had also not been paid (p 501 of the appeal record). The first appellant testified that she herself had not been paid remuneration since November 2005 (p 601 of the appeal record). However, in its letter dated 27 February 2006 the respondent had refused to provide financial support and the reason given was that the respondent had already extended RM5m (p 496 of the appeal record). Learned counsel submitted that the RM5m was in fact the company's paid-up capital.

[32] It was submitted that the learned judge had erred in finding liability against the appellants without considering the circumstances that caused the first appellant to resign. Learned counsel submitted that the learned judge had failed to consider whether the appellant's resignation was justified because of the respondent's own breach of its undertaking under cl 12.4 on financial management of the company which caused the company to be wound up and placed under receivership (p 356 of the appeal record).

[33] Learned counsel submitted that the respondent could not take advantage of its own default to claim a remedy and in support cited the cases of *Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 and *Alghussein Establishment v Eton College* [1988] 1 WLR 587. In *Alghussein Establishment* the House of Lords reiterated the well known rule of construction that there was a presumption that a party to a contract could not be permitted to take advantage of his own wrong as against the other party.

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Therefore it was submitted that the respondent herein could not rely on the first appellant's resignation to invoke the 'buy back' clause when the resignation was brought about by the respondent's own conduct.

(d) The order for specific performance and the hardship caused to the appellants

[34] Learned counsel referred to s 21(2)(b) of the Specific Relief Act 1950 and submitted that specific performance is a discretionary remedy and in the exercise of its discretion, the court has to consider hardship and weigh the comparative hardships between the parties. Section 21(2)(b) of the Specific Relief Act 1950 states as follows:

> Discretion as to decreeing specific performance
>
> 21(1) ...
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
>
> (a) ...
>
> (b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

[35] The case of *M Ratnavale v S Lourdenadin M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371 was cited in which the Supreme Court said, inter alia, that the power of the court to grant specific performance is discretionary. The remedy of specific performance is special and extraordinary in its character and the court has a discretion either to grant it or not. However the discretion is not arbitrary or capricious discretion but has to be exercised on fixed principles. The conduct of a plaintiff such as a breach on his part may render it inequitable to grant the remedy of specific performance.

[36] Learned counsel also referred to the case of *K Narendra v Riviera Apartments (P) Ltd* AIR 1999 SC 2309 where at p 2316 the Supreme Court of India said, inter alia:

> Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no hardship on the plaintiff, is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance.

It was submitted that the learned judge had failed to consider the hardship that would be caused to the appellants to buy back 6,000,000 shares in a company that had been placed under receivership due to the respondent's breach of its

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financial obligations. In the circumstances of this case learned counsel submitted that specific performance was not a fit and a proper remedy.

Submissions for the respondent

[37] Learned counsel for the respondent, Mr Wong Rhen Yen commenced his oral submissions in reply by raising the point that the memorandum of appeal showed only three grounds of appeal, but learned counsel for the appellants had submitted on grounds of appeal which were beyond the grounds set out in the memorandum of appeal, in particular the first two issues regarding the relief sought and the first appellant's liability. In support learned counsel relied upon the decision of the Federal Court in the case of *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64; [2013] 5 CLJ 949.

[38] For the appellants learned counsel invoked r 18(2) of the Rules of the Court of Appeal 1994 ('the Rules') which provides as follows:

> (2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[39] Learned counsel further cited the case of *Subramaniam a/l AV Sankar & Ors v Peter Tang Swee Guan* [2010] 4 MLJ 626. In that case the applicants had filed a notice of motion seeking amongst others for the Court of Appeal to set aside and/or review an earlier decision by another panel of the Court of Appeal. One of the grounds for the application was that the decision of the first panel had occasioned a miscarriage of justice because the written grounds of judgment showed that the first panel had disposed of the appeal on the basis of only one issue which was never raised by the parties. It was argued that the second coram was entitled to intervene and right the wrong done to the plaintiffs because the first coram had determined the appeal on an issue that was never taken up whether in the pleadings or in the submissions after trial at the High Court nor before the first coram based on the memorandum of appeal as well as the oral and written submissions of the parties. On this issue the court referred to the judgment of Gopal Sri Ram JCA (as he then was) in *Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 as follows:

> In the first place, r 18(2) of the Rules of the Court of Appeal 1994 makes it amply clear that this court in deciding an appeal is not confined to the grounds relied on by an appellant in his or her memorandum of appeal.

[40] We find that the case of *Datuk M Kayveas* does not assist us in interpreting r 18(2) of the Rules which, although it confined the parties to the grounds in the memorandum of appeal, yet it allows this court to decide the

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appeal without confining itself to the grounds set out in the memorandum of appeal. In the light of the fact that learned counsel for the respondent had taken up this point in his submissions in reply rather than as a preliminary objection thereby allowing learned counsel for the appellants to submit at considerable length enabling him to address this court on the manifest injustice of the order of the learned judge of the High Court, we dismissed this point raised by learned counsel for the respondent. We relied on the powers as stipulated in r 18(2) of the Rules and we took into consideration the grounds submitted before us.

[41] Reverting to the submissions by learned counsel for the respondent, it was submitted that the learned judge was correct to order specific performance to compel the appellants to repurchase the sale shares because the appellants had breached the agreements when the first appellant resigned from the company. Further the appellants had also failed to fulfil their undertakings to secure the four mills licensing fees contract for the company. The company had failed because the appellants failed to procure the mills licensing fees contracts and not because the respondent had breached its financial obligations.

[42] Learned counsel submitted that cl 12.4 of the principal agreement merely stated that the respondent's obligation was to manage the finances of the company, not to provide financial support. In any event the first appellant was in control of the company's accounts. The respondent had also purchased the additional 3,000,000 new shares.

[43] Learned counsel conceded that the 'buy back' clause applied only to the 3,000,000 sale shares but submitted that the said clause had also provided that the repurchase of the sale shares shall not be less than the acquisition costs stated in the agreement which would include the costs of purchase of the additional 3,000,000 shares.

[44] In respect of s 223 of the Companies Act 1965 it was submitted that s 223 does not totally prohibit the repurchase of the shares since the appellants could apply for a validation order from the winding-up court. Alternatively learned counsel submitted that the respondent ought to be awarded damages in lieu of specific performance as pleaded.

[45] In reply learned counsel for the appellants submitted that the appellants' obligation to secure the mills licensing fees contracts was subject to the respondent's obligation under cl 12.4 to manage the finances of the company. It was submitted that the court ought to take into consideration that the failure of the company was due to the lack of finances which was the respondent's obligation to provide. The lack of finances resulted in the first appellant being unable to continue operating the company which in turn had

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compelled her to resign. Therefore it was submitted that the resignation of the first appellant was due to the respondent's own breach of its contractual obligations to manage the company's finances.

OUR DECISION

[46] We have considered the submissions made and we agreed with learned counsel for the appellants that the learned judge had failed to consider whether the appellant's resignation was justified in view of the respondent's own breach of its obligation under cl 12.4 to manage the finances of the company which ultimately led to the company being wound up.

[47] We have perused the appeal record and we find ample evidence to show that the company was in financial distress and this had been communicated to the respondent (pp 493 to 495 of the appeal record). We found evidence that the first appellant had not been paid her remuneration (p 454 of the appeal record). In fact in 2011 the appellants, as guarantors, had to pay off the company's bank loans due to the respondent's default of its obligations as shown in the letter from Maybank dated 31 May 2011 and the first appellant's letter to the respondent's solicitors dated 16 June 2011 (pp 510 and 511 of the appeal record).

[48] We agreed with learned counsel for the appellants that cl 12.4 merely imposed on the appellants the obligation to operate the company. The obligation to provide financial support to the company was on the respondent. Contrary to the submissions by learned counsel for the respondent that the respondent was only contractually obliged to provide financial management to the company, we find that there was evidence to show that the respondent was aware of its obligation to provide financial support to the company in the form of a letter of support dated 3 January 2006 issued by the respondent (pp 490–491 of the appeal record). Despite this, the respondent made clear its intention not to provide any financial support to the company. On the evidence we agreed with learned counsel for the appellants that the respondent was in breach of cl 12.4.

[49] We accepted the submissions of learned counsel for the appellants that the company failed for lack of financial support, which triggered the premature resignation of the first appellant, which in turn activated the buy-back clause. It is trite that a party could not be permitted to take advantage of his own wrong as against the other party.

[50] The basis of the remedy of specific performance lies in equity. Therefore the respondent herein could not rely on the first appellant's resignation to invoke the 'buy back' clause when the resignation was brought about by the

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A respondent's own conduct. In the circumstances, we find no basis to order specific performance or damages in lieu thereof.

[51] Consequently, we allowed the appeal with costs of RM30,000 here and below. We set aside the order of specific performance made by the High Court. The deposit was ordered to be refunded to the appellants.

Order accordingly.

Reported by Afiq Mohamad Noor